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Medicaid Planning Without Gifting Assets

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The Deficit Reduction Act of 2005, which became effective February 8, 2006, has made "divestment planning" to qualify for Medicaid much more difficult. Further, many elderly individuals are uncomfortable with giving up legal control of their assets merely to protect a potential inheritance for their children. Fortunately, other planning options continue to be available.

First, individuals can maximize the use of exempt assets, i.e., those assets which are not considered "resources" for Medicaid qualification purposes. The most useful of these is the residence, which remains exempt without limit provided a "community spouse" (or a child under age 21 or disabled) still is living there, or for 13 months (up to $500,000 of equity) otherwise. Assets which would otherwise be countable resources can be "spent down" to repair or remodel the residence, or even to purchase a larger one. One automobile, regardless of value, is exempt for a couple (generally a limit of $4,500 of value applies for a single individual), as are irrevocable burial contracts and reasonable tangible personal property. Retirement plans are exempt only if the owner does not have current unrestricted access (e.g., if the owner must leave employment to receive a distribution).

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Second, an individual or couple can pay off debts. For purposes of determining resources, debts are not subtracted from assets. However, paying off debts reduces otherwise countable resources.

Finally, the community spouse is entitled to a Community Spouse Resource Allowance (CSRA) of 50% of countable resources, subject to a maximum of $109,560 and a minimum of $21,912 in 2010 (unchanged from 2009). Countable resources are calculated on the "snapshot date," i.e., the first day of 30 days of continuous institutionalization. Therefore, it is advisable to maximize assets on this date, perhaps even by borrowing. After the snapshot date has passed and the CSRA has been calculated, excess resources can be spent down by purchasing exempt assets or by paying off debts.

One possible strategy is the purchase of a single premium immediate annuity for the community spouse with the assets in excess of the CSRA. Annuity payments should be considered income to the community spouse (who may retain all of his or her income without limit), and the purchase of the annuity should not be considered an improper transfer (which would cause a period of Medicaid ineligibility) provided it (i) names the State of Ohio as first remainder beneficiary (or second remainder beneficiary after a spouse or a minor or a disabled child), and (ii) is irrevocable, non-assignable, and actuarially sound as determined by the Social Security actuarial table. The Ohio Department of Job and Family Services has taken the position in the past, based upon OAC sec. 5101:1-39-07(G)(2), that the purchase of an annuity in this circumstance is an improper transfer. However, the recent case of *Vieth v. Ohio Department of Job & Family Services* held that the cited rule is inapplicable to annuities. It remains to be seen how readily Medicaid caseworkers will follow the *Vieth* decision.

As can be seen from the above, careful planning often can qualify an individual for Medicaid sooner and preserve some assets, often without resorting to the more extreme and difficult course of action of transferring assets.

Mr. Miller is a member of the Firm and a former financial planner who practices in the areas of estate planning, probate, elder law, business law, taxation and qualified retirement plans. Should you have any questions regarding the Medicaid rules discussed in this article, please contact Mr. Miller (419-241-6000).